No. 14-8349

IN THE

Supreme Court of the United States

TIMOTHY TYRONE FOSTER

Petitioner,

v.

BRUCE CHATMAN, WARDEN

Respondent.

On Writ of Certiorari to the Supreme Court of Georgia

BRIEF OF JOSEPH DIGENOVA, GIL GARCETTI, GLENN F. IVEY, ROBERT M. A. JOHNSON, HARRY L. SHORSTEIN, LARRY D. THOMPSON, SCOTT TUROW, AND JOHN VAN DE KAMP AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are former prosecutors who recognize, and refuse to condone, the blatant illegality of the prosecutorial misconduct at issue in this case: specifically, the racially discriminatory use of strikes during jury selection to ensure that a black defendant accused of a crime against a white victim would face an all-white jury.

Joseph diGenova served as United States Attorney for the District of Columbia from 1983 to 1988 and as an Assistant United States Attorney in the District of Columbia from 1972 to 1975 and again from 1982 to 1983.

Gil Garcetti was elected to two terms as the District Attorney for Los Angeles County, serving from 1992 to 2000; prior to his election, he served as a trial prosecutor in the office for over 20 years and was also appointed as chief deputy district attorney.

Glenn F. Ivey was elected to two terms as the State's Attorney for Prince George's County—the second most populous county in the State of Maryland—serving from 2003 to 2011. He also served as an Assistant United States Attorney for the District of Columbia from 1990 to 1994.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters of consent to the filing of this brief have been filed with the Clerk's Office together with this brief.

Robert M. A. Johnson was the elected County Attorney for Anoka County, Minnesota, from 1982 to 2010 and was also President of the National District Attorneys Association from 2000 to 2001.

Harry L. Shorstein was elected to four terms as the State's Attorney for Florida's Fourth Judicial Circuit, encompassing the City of Jacksonville and Clay, Duval and Nassau Counties, serving from 1991 to 2008.

Larry D. Thompson was Deputy United States Attorney General from 2001 to 2003 and served as the United States Attorney for the Northern District of Georgia from 1982 to 1986.

Scott Turow was an Assistant United States Attorney for the Northern District of Illinois from 1978 to 1986.

John Van De Kamp served as Attorney General of the State of California from 1983 to 1991 and previously served as the Los Angeles County District Attorney from 1975 to 1981.

Amici support Petitioner's argument that the Georgia courts erred in failing to recognize a clear constitutional violation under *Batson v. Kentucky*, 476 U.S. 79 (1986). Based on the record in this case, the judgment below should be reversed and remanded.

SUMMARY OF ARGUMENT

Nearly three decades after *Batson v. Kentucky* was decided, race discrimination persists in jury selection. Numerous studies demonstrate that prosecutors use peremptory strikes to remove black jurors at significantly higher rates than white jurors. Some

prosecutorial misconduct is shockingly blatant, but most discrimination occurs under the guise of purportedly "race-neutral" justifications prepared by prosecutors with the specific objective of defeating *Batson* challenges. Some prosecutors have even provided trainings that encourage racial discrimination and explain how to conceal improper motivation from the courts.

Race discrimination in juror selection cannot be condoned. Indeed, this Court has long recognized that such discrimination causes serious and widespread harm: to the defendant, whose constitutional rights are violated; to the juror, who is excluded from the judicial process; and to our justice system, which is undermined by such inequality.

The prosecution's conduct in this case clearly violates *Batson*'s rule. The prosecutor struck all black potential jurors, and the evidence of purposeful discrimination is overwhelming: in its jury selection notes, the prosecution singled out black prospective jurors for removal and even ranked the black prospective jurors against each other. The prosecution then presented eight to ten "race-neutral" reasons for each strike, many of which were inaccurate; inconsistent with other reasons; or applied with equal or greater force to white jurors who were not struck. In addition, the prosecutor's reasons have no basis in accepted trial strategy. If this Court does not find purposeful discrimination on the facts of this case, then it will render *Batson* meaningless.

Finally, *amici* declare that the persistence of race discrimination in jury selection is antithetical to the profession's best practices. Respected industry associations such as the National District Attorneys Association and the American Bar Association have promulgated standards for prosecutors which demonstrate that unconstitutional discrimination has no place in a conscientious prosecution. This Court's ruling in *Batson* is an important safeguard against such prosecutorial abuse.

ARGUMENT

I. RACE DISCRIMINATION CONTINUES TO BE A SERIOUS PROBLEM IN JURY SELECTION.

Even decades after *Batson* was decided, many prosecutors still exclude jurors based on their race. *See Miller-El v. Dretke (Miller-El II)*, 545 U.S. 231, 268-69 (2005) (Breyer, J., concurring) (citing eight studies and anecdotal reports detailing widespread race discrimination in jury selection). Some of this discrimination gets caught, resulting in overturned convictions and new trials, but much race discrimination goes undeterred and undetected.

Numerous studies show that prosecutors use peremptory strikes against black jurors at significantly higher rates than against white jurors. In 2012, a North Carolina state court found, based on a published study of jury venires in 173 capital proceedings in North Carolina, that state prosecutors struck 52.8% of eligible black venire members, compared to only 25.7% of all other eligible venire members, meaning that black

jurors were more than twice as likely than white jurors to be removed by the prosecution, even when other characteristics one might expect to bear on the decision to strike were removed from the equation. *State v. Golphin*, No. 97 CRS 47314-15, slip op. at 153 (N.C. Super. Ct. Dec. 13, 2012). That same study found that, in cases where the defendant was black, the average strike rate against black venire members rose to 60.0%, while the strike rate against non-black venire members fell to 23.1%. Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-*Batson *North Carolina Capital Trials*, 97 Iowa L. Rev. 1531, 1549-50 (2012).

In a 2003 study of 390 felony jury trials prosecuted in Jefferson Parish, Louisiana, between 1994 and 2002, the Louisiana Crisis Assistance Center found that prosecutors struck black prospective jurors at more than three times the rate that they struck white prospective jurors. Richard Bourke, Joe Hingston & Joel Devine, Louisiana Crisis Assistance Center, *Black Strikes: A Study of the Racially Disparate Use of Peremptory Challenges by the Jefferson Parish District Attorney's Office* 1, 7-8 (2003).

In cases where the death penalty was imposed from 2005 to 2009, in Houston County, Alabama, state prosecutors used peremptory strikes to remove 80% of blacks qualified for jury service, with the consequence that half of these juries were all-white and the remainder had only a single black member, even though Houston County is 27% black. Equal Justice Initiative,

Illegal Racial Discrimination in Jury Selection: A Continuing Legacy 14 (2010).

Finally, in its 2010 review of jury selection procedures of eight southern states—Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Tennessee—the Equal Justice Initiative "uncovered shocking evidence of racial discrimination in jury selection in every state." *Id.* at 4. These studies are only a few examples.

Prosecutorial race discrimination is sometimes frighteningly overt. In 1986, Jack McMahon, an assistant district attorney in Philadelphia, created a training film teaching prosecutors to exclude young blacks from juries. He explains in the video that "blacks from the low-income areas are less likely to convict"; "you don't want those people on your jury"; "it may appear as if you're being racist, but again, you're just being realistic"; "young black women are very bad" because "they're downtrodden in two respects," namely "[t]hey are women and they're black" and "they somehow want to take it out on somebody and you don't want it to be you."[2]

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[2] L. Stuart Ditzen, Linda Loyd & Mark Fazlollah, *Avoid Poor Black Jurors, Mcmahon Said*, Phila. Inquirer, Apr. 1, 1997, http://articles.philly.com/1997-04-01/news/25529855_1_blacks-impartial-jury-young-prosecutors; *see also Former Philadelphia Prosecutor Accused of Racial Bias*, N.Y. Times, Apr. 3, 1997, http://www.nytimes.com/1997/04/03/us/former-philadelphia-prosecutor-accused-of-racial-bias.html.

Although prosecutors are at times surprisingly honest about their motivations, even admitted race discrimination does not always result in a finding of a *Batson* violation. *See, e.g., King v. Moore*, 196 F.3d 1327, 1333-35 (11th Cir. 1999) (upholding strike even though the prosecutor said she struck a juror because "[s]he is a young black female" and "Defendant is a young black male," because the prosecutor also cited the juror's attitudes about the death penalty); *id.* at 1335 (holding that "[w]hen the motives for striking a prospective juror are both racial and legitimate, *Batson* error arises only if the legitimate reasons were not in themselves sufficient reason for striking the juror").

Most discrimination, however, is veiled by purportedly "race-neutral" justifications prepared by prosecutors for the very purpose of defending their race-motivated strikes. In its 2010 review of capital cases in the south, the Equal Justice Initiative found that prosecutors all-too-often provide pretextual reasons to support the removal of black jurors, such as that those jurors have "low intelligence"; wear eyeglasses; are single, married, or separated; are too old for jury service at age 42 or too young at age 28; have relatives who attended historically black colleges; walk a certain way; chew gum; or live in a bad part of town. Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* 4, 16-18 (2010); *see also Golphin*, No. 97 CRS 47314-15, at 113-19 (finding that, in numerous cited cases, state prosecutors in North Carolina have struck black venire members because of their association with historically black institutions, for their lack of

intelligence, due to unfavorable demeanor, and because they lacked a sufficient connection to the community).

This misconduct is not limited to rogue prosecutors. Some district attorney offices train their prosecutors to deceive judges as to their true motivations. For example, in 1995, the North Carolina Conference of District Attorneys presented a statewide training course, titled "Top Gun II," which provided a list of justifications for prosecutors to rely on when striking black jurors. *Golphin*, No. 97 CRS 47314-15, slip. op. at 73-74. One of the materials distributed at the training was a one-page handout titled "*Batson* Justifications: Articulating Juror Negatives." *Id.* This document provides a list of ten kinds of "justifications" a prosecutor might offer in response to a *Batson* challenge, including age, attitude, body language, and juror response. *Id.* Relying on these kinds of lists, some prosecutors have entered into the habit of offering a smorgasbord of justifications when their strikes are challenged, rather than pointing to the one or two reasons that actually motivated their conduct—be they race-based, or not. Courts have held that this practice of offering a "laundry list" of strike justifications is evidence of race discrimination. *See, e.g.*, *Sheets v. State*, 535 S.E.2d 312, 315 (Ga. Ct. App. 2000) (concluding that prosecutor's "'laundry list' of reasons for almost every strike" was evidence of race discrimination); *McGlohon v. State*, 492 S.E.2d 715, 717-18 (Ga. Ct. App. 1997) (affirming finding of purposeful discrimination where defendant "proffered a 'laundry list' of reasons for almost every strike, only some of which were facially neutral").

Race discrimination, to be sure, goes both ways—not only prosecutors, but also defendants, use peremptory strikes to remove jurors on the basis of their race. Whereas prosecutors tend to remove black jurors, defendants often strike white jurors at a disproportionate rate. David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. Pa. J. Const. L. 3, 53, 58 (2001) (finding, in a study of strike decisions over a seventeen-year period in 317 Philadelphia County capital murder trials, that prosecutors struck on average 51% of black jurors they could strike, compared to only 26% of comparable non-black jurors, whereas defense counsel struck only 26% of black jurors they had the opportunity to strike, compared to 54% of comparable non-black jurors); Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 Law & Hum. Behav. 695, 697-99 (1999) (finding, in a study of peremptory strikes in thirteen noncapital felony trials in North Carolina, that prosecutors used 60% of their strikes against black jurors, who constituted only 32% of the venire, whereas defense attorneys used 87% of their strikes against white jurors, who made up 68% of the venire).

This kind of discriminatory conduct cannot be condoned. This Court has long recognized that race discrimination in jury selection harms not only the defendant on trial but also the excluded juror—indeed, that it denigrates whole classes of persons and undermines the integrity of our system of justice. *Miller-El II*, 545 U.S. at 238 (discrimination in jury selection "casts doubt over the obligation of the parties,

the jury, and indeed the court to adhere to the law throughout the trial" (quoting *Powers v. Ohio*, 499 U.S. 400, 412 (1991)); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994) (such discrimination "causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded"); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991) ("Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality."); *Powers*, 499 U.S. at 412 (discrimination by prosecutors "invites cynicism respecting the jury's neutrality and its obligation to adhere to the law"); *Batson*, 476 U.S. at 87 (race discrimination against jurors "harms not only the accused whose life or liberty they are summoned to try," but also "the excluded juror" and "the entire community," because "[s]election procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice"); *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880), (discrimination against racial minorities is "an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others"), *abrogated on other ground by Taylor v. Louisiana*, 419 U.S. 522 (1975). Race discrimination in the judicial process also has profound societal consequences, causing racial backlash, violence in the community, and perpetuation of race stereotypes. Equal Justice Initiative, *Illegal Racial*

Discrimination in Jury Selection: A Continuing Legacy 38-41 (2010).

In light of this troubling evidence, this Court should send a clear message that blatant race discrimination will not be tolerated in jury selection, even if prosecutors are able to proffer post-hoc justifications for their strikes. Where, as here, the record shows that race played a substantial role in the decision to strike, the stain of racism cannot be washed away by the assertion that some other, "race-neutral" justification would have sufficed. Put differently, prosecutors should be encouraged to make sound trial decisions from the start, rather than well-crafted excuses after the fact.

II. THE PROSECUTION'S CONDUCT IN THIS CASE CLEARLY VIOLATED *BATSON v. KENTUCKY*.

The evidence in this case conclusively shows a *Batson* violation. The question presented involves an assessment of the evidence at the third and final stage of the *Batson* analysis, after the defendant has made a "prima facie showing" of racial discrimination and the prosecution has proffered "a neutral explanation for challenging black jurors." *Batson*, 476 U.S. at 95, 97. Because the Georgia courts reached step three, the outcome here turns on whether Foster has established that the State engaged in purposeful discrimination. This determination requires courts to consider "all of the circumstances that bear upon the issue of racial animosity." *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008); *see Miller-El II*, 545 U.S. at 240 (requiring consideration of "all relevant circumstances"); *Batson*,

476 U.S. at 96 (same). As this Court has further explained, "the critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike." *Miller-El v. Cockrell (Miller-El I)*, 537 U.S. 322, 338-39 (2003). Where there is clear evidence of racial motivation, the prosecution's neutral reasons should be viewed with particular suspicion.

The evidence of racial discrimination in this case is overwhelming. The prosecution singled out the black prospective jurors in at least *five* ways. First, it highlighted their names with a green marker on four different copies of the jury list. J.A. 253-78. Second, it marked their names with a "B" on those four jury lists. *Id.* Third, it circled the word "BLACK" in six prospective jurors' questionnaires. J.A. 311, 317, 323, 329, 334, 337. Fourth, it referred to three prospective jurors as "B #1," "B #2," and B #3" in its notes. J.A. 295-97. Fifth, it ranked black prospective jurors against each other in case "it comes down to having to pick one of the black jurors." J.A. 345.

In this context, the prosecution's proffered justifications for using its peremptory strikes to eliminate *every* remaining black prospective juror fail to meet any reasonable standard of "persuasiveness." *See Miller-El I*, 537 U.S. at 338-39. The prosecution provided eight to ten "race-neutral" reasons for each of the four strikes. Some of those justifications were blatantly inaccurate (one thirty-four-year-old potential juror was struck in part due to her "age being so close to the [nineteen-year-old] defendant," J.A. 56); some

were extreme exaggerations (that "theft by taking" arising from stealing hubcaps from a car, T.R. 446, is "basically the same thing that this defendant is charged with," where the defendant was facing a capital indictment for murder, burglary, and theft by taking, J.A. 45); and some directly contradicted others (one black juror "asked to be off the jury," J.A. 45, while another did *not* ask to be let off the jury, J.A. 56). Many of the reasons applied equally to white jurors who were allowed to serve—for example, Marilyn Garrett's occupation as a teacher's aide counted against her even though the prosecutor claimed to want jurors who were "associated with teachers" and accepted every white teacher and teacher's aide in the qualified pool. J.A. 56, T.R. 427, 429-30. The prosecution even gave reasons that applied with *greater* force to white jurors who the prosecution kept on the jury.[3]

The prosecution's notes reveal with unmistakable clarity that these "race-neutral" reasons resulted from a deliberate effort to conceal its racially motivated decision-making. For example, the prosecution falsely represented to the court that its notes list Marilyn Garrett as "questionable," T.R. 439, while its notes reveal that she was on the list of "definite NO's" along

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[3] For example, the prosecutor voiced concern that Hood's son was near the same age as the defendant. J.A. 44. When jurors were asked whether the defendant's age would be a factor in sentencing, Hood replied "none whatsoever," while a white juror with teenage sons replied "probably so." T.T. 280, 527. Hood was struck and the white juror was accepted.

with the rest of the remaining black jurors.[4] J.A. 301. These notes also reveal that a reason the prosecution gave for striking Eddie Hood—that "[h]is religious preference is Church of Christ"—was a pretext for race. J.A. 302. The prosecution represented to the trial court that the Church of Christ was problematic because "the Church of Christ definitely takes a stand against the death penalty," J.A. 46, but its notes written under the heading "Church of Christ" state that it "doesn't take a stand on Death Penalty," followed by, "NO NO Black Church." J.A. 302. Under these circumstances, it is unsurprising that the prosecutor stated at a post-trial hearing that "I don't want [defense counsel] to have access to my file." J.A. 79. As this Court concluded in *Miller-El v. Dretke*, "[t]he prosecutors' chosen race-neutral reasons for the strikes do not hold up and are so far at odds with the evidence that pretext is the fair conclusion, indicating the very discrimination the explanations were meant to deny." 545 U.S. at 265.

At the *Batson* hearing, the prosecutor articulated his view that "[a]ll I have to do is have a race neutral reason, and all of these reasons that I have given the Court are racially neutral." J.A. 48. That is not an accurate representation of the *Batson* standard applicable here. At step three, courts are tasked with determining whether the "relevant circumstances raise an inference that the prosecutor used [peremptory

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[4] The odds of randomly selecting all of the remaining black prospective jurors as the first five names on this list of "definite NO's" is approximately one in a million.

strikes] to exclude the [black] veniremen from the petit jury on account of their race." *Batson*, 476 U.S. at 96. This Court has explained that the "critical question in determining whether a prisoner has proved purposeful discrimination at step three" can hinge on the "credibility" of the prosecutor's justifications for the strikes. *Miller-El I*, 537 U.S. at 339. "Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Id.*

The prosecutor's explanations for striking every black potential juror in this case have no "basis in accepted trial strategy." The purpose of peremptory challenges is to allow attorneys to eliminate "jurors who are clearly biased, as well as those whose impartiality is doubted even though there may be insufficient evidence to convince the trial judge to excuse the juror for cause." James J. Gobert et al., Jury Selection: The Law, Art and Science of Selecting a Jury § 8:1, Westlaw (database updated Dec. 2014). Peremptory strikes based on factual inaccuracies, internal contradictions, and explanations that apply at least as strongly to jurors whom the State accepted cannot possibly serve this purpose.[5] No logically—or

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[5] Moreover, an overarching jury selection strategy that the prosecutor claimed to be executing has been deemed by this Court to be an "unconstitutional proxy for juror competence and impartiality." *J.E.B.*, 511 U.S. at 129. At the *Batson* hearing, the prosecutor explained,

> [W]hen I look at a death penalty, I look for more reasons than race .... The gender, male or female, ... is something

legally—defensible trial strategy is advanced when a prosecutor eliminates a thirty-four-year-old black potential juror for being "so close" in age to a nineteen-year-old defendant, strikes black veniremen for asking to be let off the jury and *not* asking to be let off the jury, and discards only the black members of the jury pool who are "teachers [and] those associated with teachers." T.R. 427. In the absence of a plausible strategic justification for these strikes based on the "race-neutral" explanations articulated on the record, the clear inference to be drawn is that these reasons were pretextual.

Failing to find purposeful discrimination under these extreme circumstances would strip *Batson* of its meaning. In the words of one state court of appeals, "[r]ecent consideration of the *Batson* issue makes us wonder if the rule would be imposed only where the prosecutor states that he does not care to have an African-American on the jury." *People v. Randall*, 671 N.E.2d 60, 66 (Ill. App. Ct. 1996). Supreme Court approval of the prosecutor's tactics in this case would be tantamount to an answer in the affirmative. It would signal to prosecutors that, indeed, all they have to do is describe any non-racial characteristic of a

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> I always look at. [W]omen appear to be more sympathetic to jurors (sic) in a death penalty case than men. As indicative of the strikes that I used on my ten, I struck eight women. Eighty percent of my strikes were women.'

J.A. 41-42. This is precisely the type of strategy that this Court considers *unacceptable*. *J.E.B.*, 511 U.S. at 129 (extending *Batson* to gender discrimination).

racially undesirable juror—or, if in doubt, resort to vague demeanor-related explanations[6] that will forever be unverifiable by future courts.[7] This case is "replete with evidence that the prosecutors were selecting and rejecting potential jurors because of race," *Miller-El II*, 545 U.S. at 265, and devoid of persuasive evidence indicating race-neutrality. *Amici* therefore urge this Court to reverse the decision below.

III. THE ACTIONS OF THE PROSECUTION DISREGARDED PROSECUTORIAL BEST PRACTICES.

Despite the persistence of race discrimination in jury selection, such discrimination is antithetical to accepted prosecutorial methodology. The ban on race discrimination under *Batson* does not impair the pursuit of a conscientious prosecution, but only

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[6] Here, the prosecutor characterized every black juror as some combination of nervous, slow, confused, hostile, bewildered, and incoherent—attributes that the record is inherently unable to reflect. J.A. 49-53.

[7] Prosecutors would be encouraged to pursue trial strategies that play to—and further entrench—race-based fears and stereotypes as well. In *Batson*, this Court recognized that "[d]iscrimination within the judicial system is most pernicious because it is a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others." *Batson*, 476 U.S. at 87-88 (internal quotations omitted) (bracket in original). The advocacy by the prosecutor at Foster's trial for a death sentence to "deter other people out there in the [predominantly African-American inhabited] projects" serves as a prime example of the "stimulant" to racial prejudice that *Batson* aims to eliminate. T.T. 2505.

prevents prosecutorial abuse. It should be self-evident that a prosecutor's fulfillment of his or her function depends not only on seeking a conviction but on upholding constitutional principles and maintaining the public's faith in the rule of law—a charge in which there is no place for race discrimination. *See Batson*, 476 U.S. at 87 ("Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice."). When prosecutors discriminate in the selection of jurors, they violate the Constitution and abdicate their responsibility to the public.

Amici, who are former prosecutors with many years of service to federal, state, and local governments, assert that race discrimination has no place in jury selection or in the prosecutorial function. Prosecutors who follow the profession's best practices in selecting a jury will not discriminate on the basis of race or other prohibited characteristics, and will thus not run afoul of the rule stated in *Batson*. These best practices, which should be apparent to the diligent prosecutor, have been clearly articulated by several leading industry associations.

The National Prosecution Standards of the National District Attorneys Association, which are now in their Third Edition, state that prosecutors "should not exercise a peremptory challenge in an unconstitutional manner based on group membership or in a manner that is otherwise prohibited by law."[8] The commentary

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[8] National District Attorneys Ass'n, National Prosecution Standards, Standard 6-2.3 (3d ed. 2009), *available at*

reminds prosecutors that, when they exercise peremptory challenges, they should be mindful that they are representatives of all people in their jurisdictions and "it is important that none of those people be obstructed from serving on a jury because of their status as a member of a particular group." Nat'l Prosecution Standards 6-2 Commentary. The pursuit of a deliberate strategy to exclude black jurors shows a complete disregard for the duty to represent all people in a prosecutor's jurisdiction.

Similarly, in February 2015 the American Bar Association's House of Delegates adopted the Fourth Edition of its ABA Standards for Criminal Justice: Prosecution and Defense Function.[9] These standards are intended to describe "best practices" for prosecutors. *See* ABA Crim. Justice Standard 3-1.1(b). With regard to jury selection, the standards provide that a prosecutor "should not strike jurors based on any criteria rendered impermissible by the constitution, statutes, applicable rules of the jurisdiction, or these standards, including race, sex, religion, national origin, disability, sexual orientation or gender identity." *See* Standard 3-6.3(b). There is no place for the blatant illegality at issue here.

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http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf ("Nat'l Prosecution Standards").

[9] Am. Bar Ass'n, Criminal Justice Standards for the Prosecution Function (4th ed. Feb. 2015), *available at* http://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition.html ("ABA Crim. Justice Standards").

The American Bar Association's Commission on the American Jury Project has also published Principles for Juries and Jury Trials.[10] Principle 11(F) addresses peremptory strikes, stating: "No party should be permitted to use peremptory challenges to dismiss a juror for constitutionally impermissible reasons."

While these standards and principles are not binding law, they provide a clear statement of the values and ethical standards that should guide prosecutors as they undertake public service. As set forth in the ABA's Standards for Criminal Justice, the role of the prosecutor is "to seek justice within the bounds of the law." ABA Crim. Justice Standards 3-1.2(b). This important charge does not encompass the use of race discrimination in jury selection, as clearly established through the articulation of prosecutorial best practices by respected industry associations. *Amici*, relying on their extensive prosecutorial experience, view the conduct at issue here as a failure to uphold the standards of their profession. The prosecution in this case acted in a way that was clearly illegal and at odds with the values and responsibilities that prosecutors are bound to uphold.

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[10] Patricia Lee Refo, Am. Bar Ass'n, Am. Jury Project, *Principles for Juries and Jury Trials* (2005), available at http://www.americanbar.org/content/dam/aba/migrated/juryprojectstandards/principles.authcheckdam.pdf.

CONCLUSION

For the foregoing reasons, the judgment of the Georgia Supreme Court should be reversed and remanded.

Respectfully submitted,

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